No. 12994

e United States Court of Appeals for the Ninth Circuit

AL LABOR RELATIONS BOARD, PETITIONER

v.

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N FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

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AUTHORITIES CITED

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v.

S. GUERIN, RAYBURN B. GUERIN, AND ED R. , INDIVIDUALLY AND AS COPARTNERS, DOING SS AS R. B. GUERIN & COMPANY, GENERAL ACTORS, RESPONDENTS

ON FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

ase is before the Court upon the petition of ional Labor Relations Board (hereinafter ne Board) for enforcement of its order 0) issued against respondents on January pursuant to Section 10 (c) of the National elations Act, as amended (61 Stat. 136, 29 Supp. IV, Sec. 151 *et seq.*, hereinafter referred Act.) [1] The Board's decision and order are in 92 NLRB No. 255. This Court has juris-

unfair labor practice in question (the disch
employee Dick Spicher for nonmembership in
organization) occurred in Modoc County, Ca
within this judicial circuit.

STATEMENT OF THE CASE

A. The Board's findings of fact and conclusions

1. The business of the respondents

In July 1949 at the time of the unfair labor
here involved, respondents, general construct
tractors, were principally engaged under contr
the State of California in filling, grading, an
ing 8.1 miles of California State Highway
between Cedarville and Tom's Creek, Modoc
California (R. 21, 57; 65, 76–77).[3] At th
Highway 28 runs in an easterly direction an
the link between the last highway junction
fornia (with United States Highway 395)
highway system of the State of Nevada, the
of which it crosses a few miles east of the st
which respondents worked (R. 21–23, 57;
The portion of the highway on which resp
worked appears to be the main traffic artery
ing northeast California and northwest Nev
23; 76–77). From June 1, 1949, to June 3
respondents' direct out-of-State purchases w

[2] The Board adopted the findings, conclusions, an
mendations of the Trial Examiner with certain addi
modifications (R. 56).

[3] Record references which precede the semicolon a

machinery, partly new, valued at $300,000, for the most part, was manufactured and as- in States other than California (R. 21–22, 72–76). Upon these facts the Board found pondents were engaged in interstate commerce he jurisdiction of the Board (R. 56–57).

g of Employee Spicher as a man supposedly cleared by the Union

ndents had subcontracted part of the work way 28 to the firm of Muerin and Cox (R. , 131–132). When one of the caterpillar used on the job required overhauling, Muerin spondents to overhaul it at his expense (R. 30; lowever, when Muerin became dissatisfied with k of the mechanic whom respondents had to that job, respondent Ed R. Guerin told find a mechanic satisfactory to him (R. 30;). Muerin thereupon asked Dick W. Spicher, rienced heavy duty mechanic (R. 34; 100–101, who was then working at Madras, to come rville to work on the job (R. 30, 33; 92–93, 26–128). One of respondents' office employees ed Spicher on July 5, 1949, telling him to Cedarville, and expressly advised him that nts had cleared him with Operating Engi- cal Union No. 3 of the International Union ting Engineers, hereinafter called the Union 93, 98–99). At that time respondents' policy ire only men approved by the Union in order

(R. 43, 44; 86–88).

3. The firing of Spicher upon the Union's refusal to clea

After signing papers at respondent's field
July 6, 1949, Spicher actually reported for
respondent's shop on the project on July 7
93–94, 99, 101, 127–130). That day he perform
on various equipment to which Lloyd Martin,
ent's chief mechanic, assigned him, including
caterpillar tractor (R. 31; 129).

When Spicher reported for work the n
July 8, in the morning, Martin told him
back for the evening shift, starting at 3:3
(R. 31; 94). Returning at that time, Spic
met outside the shop by Archibald, the busine
of the Union, who asked whether Spicher
union book and clearance from the Union
102). Spicher replied that he did not have
with him and that he had been cleared
Union through respondents' office (R. 31;
By that time Master Mechanic Martin had
of the shop and joined Spicher and Archibald
95, 103). Archibald asked Martin, who was
ber of the Union himself (R. 31; 88), wh
had seen Spicher's clearance. Martin replied
had not (R. 31; 95, 103). Thereupon A
told Spicher: "There is nothing I can do
then," adding that he had men at the Local
for jobs (R. 31; 95, 103–104). Archibald ask
tin whether he could get along without Spic

had power to discharge employees (R. 40; told Spicher "I guess I can't use you, then" nd Archibald went away together (R. 32;

thereupon left the job (R. 32; 96). He only for his work on July 7, 1949 (R. 32). cher had filed a charge against respondents Board, and after some correspondence had tween respondents and the Board's Regional San Francisco,[4] respondents offered Spicher nent on September 21, 1949 (R. 32; 133).
se facts, the Board found that Spicher was l by respondents because of the refusal of n to "clear" him, and that such discharge Section 8 (a) (3) and (1) of the Act (R.

B. The Board's order

ard ordered respondents to cease and desist ouraging membership of their employees in n or any other labor organization by dis- employees or in any other manner discrim- gainst them with regard to hire or conditions yment, and from in any other manner in- with, restraining or coercing their employees ercise of the rights protected by the Act. rely, the order requires respondents to make

eing served with the charge, respondents wrote the gional Office on July 28, 1949, stating their "under- at [they] must employ union members in good stand- willing to become affiliated with a union or else have

September 21, 1949, and to post appropria
(R. 58–60).

ARGUMENT

I

**Respondents are engaged in interstate commerc
Board properly asserted jurisdiction over their o**

In the light of settled authority establishin
repair and maintenance of highways const
gaging in interstate commerce, respondents'
in repairing California Highway No. 28 a
where it necessarily carried traffic between
and Nevada were plainly subject to the juris
the Board. *Overstreet* v. *North Shore C*
U. S. 125, 129–130; *Bennett* v. *Loftis,* 167
(C. A. 4), and cases there cited. An equ
basis for the Board's assertion of jurisdic
be found in respondents' purchases of me
directly from without the State and their
new equipment manufactured and assemble
the State. *N. L. R. B.* v. *Denver Bldg. Co*
U. S. 675, 683–684; *N. L. R. B.* v. *Towsend*
378, 382 (C. A. 9), certiorari denied, 341 U
Respondents' suggestion that the Board sh
declined as a matter of policy to assert ju
here is not well taken, for the Board's juri
policy expressly includes operations suc
spondents' (see *Hollow Tree Lumber Co.,*
R. B. No. 113, 26 L. R. R. M. 1543; *Depe*
Co., 92 NLRB No. 36, 27 L. R. R. M. 1057

n, "Providing the Board acts within its
and constitutional power, it is not for the
say when that power should be exercised."
d case, *supra,* 185 F. 2d at 383.

II

al evidence supports the Board's finding that respondents discharged Spicher for nonmembership in the violation of Section 8 (a) (3) and (1) of the Act

idence summarized above (pp. 4–5) establishes
ondents' master mechanic Martin, who had
to discharge employees, was advised by
n that it had not cleared Spicher for em-
, and that Martin thereupon told Spicher,
I can't use you, then."[5] This evidence fully
the Board's finding that respondents dis-
Spicher because he was not "cleared" for
ent by the Union. That a discharge under
cumstances contravenes Section 8 (a) (3)
ll settled to require argument. *N. L. R. B.*
Co., 180 F. 2d 445, 447 (C. A. 9), and cases
ed.[6]

's denial that he made this statement raised a conflict
s testimony and that of Spicher. The Trial Examiner
his reasons for accepting Spicher's version (R. 32, n. 7).
adopted the Trial Examiner's credibility findings. See
Camera Corp. v. *N. L. R. B.*, 340 U. S. 474, 488.
s no contention that respondents had a valid union
greement permitting discharge for nonmembership in
(R. 42–43). Moreover, no such contract could lawfully
discharge of a newly hired employee within 30 days
ate of hiring, and even after that period discharge could
required only for nonpayment of union dues and initia-

Spicher was hired by mistake, that he was not to do the work, and that he left the job of accord either because he discovered he coul the work,[7] or because of some compulsion Union. In rejecting these contentions the T aminer and the Board relied not only u credited testimony as to the circumstances of S termination (*supra,* pp. 4–5) but also upon mony that he had talked to Muerin about before he was hired (R. 33; 127), upon the any credible evidence that he was not qual 33–34; 121–125), and upon respondent Ed R. admission that respondents would not retain ployees not "cleared" by the Union (R. 35–40 In addition to the grounds expressed by th for rejecting respondents' contentions, it may that the contentions as to "mistaken identi want of qualifications are palpable after which respondents not only failed to advance letter to the Board written 3 weeks after S discharge (see *supra,* note 4), but which ar sistent with the reasons there stated. Moreo in the letter and in his testimony, responde Guerin did not rely upon the simple allega Spicher had quit but instead explained his ter in the light of the Union's economic pressu respondents. It is, of course, beyond disp

[7] Respondents nowhere explain the contradictio Spicher's returning to his job twice on July 8 (*supra*

ision of economic hardship is not an excuse for
; the Act. *N. L. R. B.* v. *Star Publishing Co.*,
465, 470 (C. A. 9); *N. L. R. B.* v. *Graham*,
d 787, 788 (C. A. 9); *N. L. L. B.* v. *Gluek*
Co., 144 F. 2d 847, 853–854 (C. A. 8), and
re cited.

Board's finding that respondents discharged
because of the Union's refusal to "clear" him
loyment is therefore supported not only by
ited testimony of the dischargee, but by the
respondents' contentions upon analysis actu-
her support the Board's finding. Since this
inding of fact is thus supported by substantial
on the record considered as a whole, it follows
Board properly concluded that Spicher's
e violated Section 8 (a) (3).

III

e Board's procedure was valid and proper

ndents contended that the entire proceeding
e dismissed because the Board in its com-
ad not joined the Union and the Associated
Contractors of America ("AGC") [8] as parties
nt. If this objection were well taken the
ould be powerless to remedy the unfair labor
in this case, for the scheme of the National
elations Act is such that no person can be
party respondent who has not been named in

dents belonged to AGC, which had a contract recog-
Union as exclusive bargaining representative. The

a charge, and no charge was filed against
AGC or the Union. However, the objecti
be devoid of merit even in private litigati
so all the more in the light of the public
protected by the administrative proceeding
Board.

Neither the AGC nor the Union were "n
parties in the accepted sense that their part
was necessary in order to adjudicate the en
troversy. Had they been "necessary" part
non-joinder would still be excusable because a
ment that these parties, not named in any c
joined would have deprived the Board of ju
to proceed in the case. Cf. Federal Rules
Procedure, Rule 19 (b). Since the contro
tween the Board and the respondent comp
not extend to AGC and the Union, and

[9] Pursuant to Section 10 (b), "the Board * * *
power to issue * * * a complaint" "whenever it
that any person has engaged * * * in any * *
labor practice." See *N. L. R. B.* v. *Hopwood Retinnin*
98 F. 2d 97, 102 (C. A. 2). This statutory scheme ha
in cases of discriminatory discharges caused by union
in proceedings against the employer alone like the p
also in proceedings against the union alone. See *e. g*
Union of Marine Cooks and Stewards, *C. I. O.*, Decemb
92 N. L. R. B. No. 147, 27 L. R. R. M. 1172; *Pen and Pe*
ers, *Local 19,593*, October 10, 1950, 91 N. L. R. B. N
L. R. R. M. 1583; *International Union*, *United Automo*
ers, *Local 291*, December 27, 1950, 92 N. L. R. B. N
L. R. R. M. 1188; *International Heat and Frost Insu*
Asbestos Workers, *Local 7*, *AFL*, December 21, 1950, 92
134, 27 L. R. R. M. 1154. In those cases the Board o

ation by the Board does not affect, or inter-
h, any legal right of these entities, they are,
e, not "indispensable" parties. "If the case
completely decided, as between the litigant
the circumstance that an interest exists in
her person, whom the process of the court
reach, * * * ought not to prevent a decree
s merits." *Elmendorf* v. *Taylor,* 10 Wheat.
7–168, as quoted by Mr. Justice Curtis in
v. *Barrow,* 17 How. 130, 142; Moore's Federal
(2d ed. 1948) Par. 19.07.[10]

ese circumstances [11] it is unnecessary to inquire
extent the traditional rules on compulsory
of parties apply to Board proceedings. Suf-
refer to the statement of the Supreme Court
a proceeding so narrowly restricted to the
on and enforcement of public rights, there is
ope or need for the traditional rules govern-

the Union been joined as a party and found to have
he Act, respondents would have been jointly and sev-
ble with the Union. *Union Starch & Refining Co.* v.
., 186 F. 2d 1008, 1013–1014 (C. A. 7), certiorari denied,
, 1951. By analogy to the law governing joint tort-
follows that the Union was not an indispensable party.
sors are not indispensable or necessary to an action
ne of their number, because their liability is both joint
al". Moore's Federal Practice (2d ed. 1948) Par. 19.07;
Nat. Bank v. *Johnson,* 251 U. S. 68, 84; *Mason* v.
n, 82 Fed. 689, 690 (C. A. 7).

ondent's objection to the nonjoinder of the AGC was
oviated by the Board's declaration that, unlike the Trial
, it did "not predicate [its] findings herein on any evi-
ating to the organization and functions of The Asso-

private rights." *National Licorice Co.* v. *N. L*
309 U. S. 350, 363. See also *N. L. R. B.* v.
& Michigan Electric Co., 124 F. 2d 50, 53–55
6), and cases there discussed, affirmed with
cussion of this point, 318 U. S. 9.

CONCLUSION

It is respectfully submitted that the Board p
assumed jurisdiction of this case, that its find
supported by substantial evidence on the rec
sidered as a whole, that its order is valid a
a decree should issue enforcing the order in
prayed in the Board's petition.

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NOVEMBER 1951.

APPENDIX

velant provisions of the National Labor Act, as amended, in effect at the times relevant 61 Stat. 136, U. S C. Supp. IV, Sec. 151, e as follows:

DEFINITIONS

c. 2. When used in this Act—

* * * * *

6) The term "commerce" means trade, ffic, commerce, transportation, or communi-ion among the several States, or between District of Columbia or any Territory of United States and any State or other rritory, or between any foreign country and State, Territory, or the District of umbia, or within the District of Columbia or Territory, or between points in the same te but through any other State or any rritory or the District of Columbia or any eign country.

7) The term "affecting commerce" means commerce, or burdening or obstructing com-rce or the free flow of commerce, or having or tending to lead to a labor dispute bur-ing or obstructing commerce or the free w of commerce.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to f-organization, to form, join, or assist labor anizations, to bargain collectively through resentatives of their own choosing, and to gage in other concerted activities for the rpose of collective bargaining or other tual aid or protection, and shall also have right to refrain from any or all of such

may be affected by an agreement
membership in a labor organization a
tion of employment as authorized i
8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unf
practice for an employer—

(1) To interfere with, restrain,
employees in the exercise of th
guaranteed in Section 7;

* * * *

(3) By discrimination in regard t
tenure of employment or any term or
of employment to encourage or d
membership in any labor organizat
vided, That nothing in this Act, or in
statute of the United States, shall
an employer from making an agree
a labor organization (not establish
tained, or assisted by any action
Section 8 (a) of this Act as an un
practice) to require as a condition o
ment membership therein on or
thirtieth day following the beginnin
employment or the effective date of s
ment, whichever is the later, (i) if s
organization is the representative o
ployees as provided in Section 9 (a
appropriate collective-bargaining un
by such agreement when made; an
following the most recent election
provided in Section 9 (e) the Bo
have certified that at least a major
employees eligible to vote in such ele
voted to authorize such labor organ
make such an agreement: *Provided*
That no employer shall justify any d

) was not available to the employee on the
e terms and conditions generally applicable
other members, or (B) if he has reasonable
unds for believing that membership was
ied or terminated for reasons other than
failure of the employee to tender the
iodic dues and the initiation fees uniformly
uired as a condition of acquiring or
aining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

EC. 10. (a) The Board is empowered, as here-
fter provided, to prevent any person from
aging in any unfair labor practice (listed
Section 8) affecting commerce. This power
ll not be affected by any other means of
ustment or prevention that has been or may
established by agreement, law, or other-
e. * * *

c) * * * If upon the preponderance of
testimony taken the Board shall be of the
nion that any person named in the complaint
engaged in or is engaging in any such
air labor practice, then the Board shall state
findings of fact and shall issue and cause
e served on such person an order requiring
n person to cease and desist from such un-
labor practice, and to take such affirmative
on including reinstatement of employees
n or without back pay, as will effectuate the
cies of this Act * * *.

e) The Board shall have power to petition
circuit court of appeals of the United States
cluding the United States Court of Appeals
the District of Columbia), or if all the
uit courts of appeals to which application
be made are in vacation, any district court

spectively, wherein the unfair labor
in question occurred or wherein such
resides or transacts business, for the
ment of such order and for appropr
porary relief or restraining order,
certify and file in the court a transcr
entire record in the proceedings, incl
pleadings and testimony upon which s
was entered and the findings and ord
Board. Upon such filing, the court s
notice thereof to be served upon such
and thereupon shall have jurisdictio
proceeding and of the question d
therein, and shall have power to g
temporary relief or restraining ord
deems just and proper, and to make
upon the pleadings, testimony, and pr
set forth in such transcript a decree
modifying, and enforcing as so mo
setting aside in whole or in part the
the Board. No objection that has
urged before the Board, its member,
agency, shall be considered by the cou
the failure or neglect to urge such
shall be excused because of extraord
cumstances. The findings of the B
respect to questions of fact if support
stantial evidence on the record consid
whole shall be conclusive. * * *